LIBRARY
SUPREME COURT, U S

# Vol. XI

## TRANSCRIPT OF RECORD

(Pages 4162 to 4595)

## Supreme Court of the United States

OCTOBER TERM, 1948

## No. 228

NYE & NISSEN (A CORPORATION), AND ABRAHAM MONCHARSH, PETITIONERS,

*vs.*

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1948.

CERTIORARI GRANTED OCTOBER 25, 1948.

# No. 11308

## United States

# Circuit Court of Appeals

### For the Ninth Circuit.

---

NYE & NISSEN, a Corporation, and ABRAHAM MONCHARSH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

## SUPPLEMENTAL

# Transcript of Record

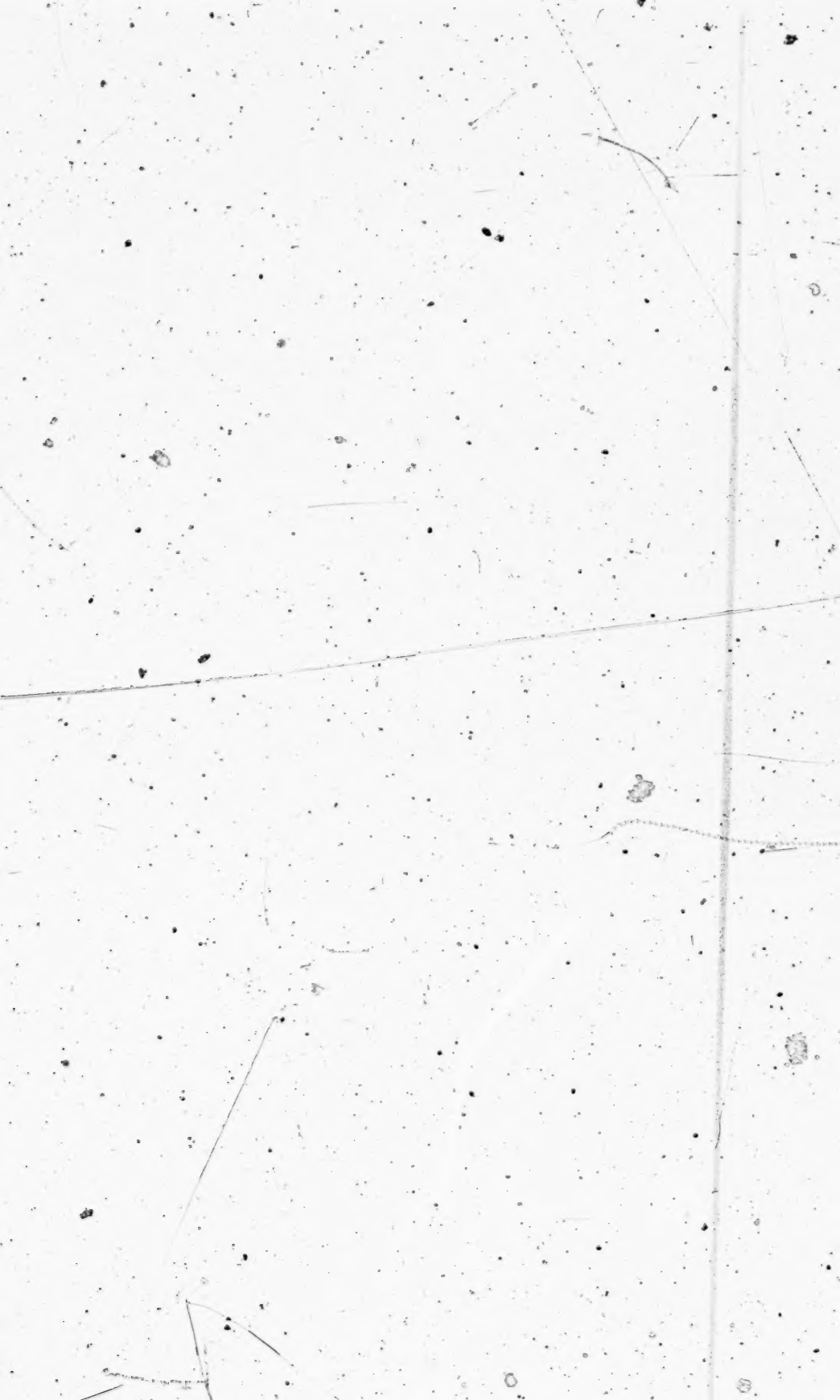
## VOLUME XI

### Pages 4462 to 4595

---

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 870 Brannan Street, San Francisco



# INDEX

Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.


| | PAGE |
|---|---|
| Certificate of Clerk to Reporter's Transcript | 4592 |
| Closing Argument on Behalf of Government by Mr. Pratt | 4570 |
| Opening Argument by Mr. Houck | 4464 |
| Oral Argument on Behalf of Defendants by Mr. Sullivan | 4506 |
| Oral Argument by Mr. Faulkner on Behalf of Defendants | 4526 |
| Reporter's Transcript | 4463 |
| Stipulation That Transcript of Record May be Supplemented | 4594 |

In the Southern Division of the United States District Court, in and for the Northern District of California

Before: Hon. Theodore J. Roche, Judge.

Criminal No. 29,518-R

UNITED STATES OF AMERICA

vs.

NYE & NISSEN, a corporation; ABRAHAM MONCHARSH, HENRY EUGENE BERMAN, RUBY JUTLAND GODDARD, and EDWARD LEROY MENGES,

Defendants.

REPORTER'S TRANSCRIPT

Thursday, April 4, 1946, and Friday, April 5, 1946

Oral Arguments to the Jury [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

Thursday, April 4, 1946, 2:00 o'clock p. m.

The Court: Waive the roll call, stipulating and agreeing all the jurors are present.

Mr. Houck: Yes, your Honor.

Mr. Faulkner: Stipulated.

## OPENING ARGUMENT BY MR. HOUCK

Mr. Houck: May it please the Court, and ladies and gentlemen of the Jury, it is my duty at this time to summarize the Government's case for you. We have been here in trial between eleven and twelve weeks, and at the end of a testimony in a criminal case the Government has the opportunity to open argument in summarizing this case. After I have finished, the defense counsel will have an opportunity to summarize its case, and then Mr. Pratt for the Government will have an opportunity to argue in rebuttal to what is said in behalf of the defendants.

In summarizing the case to you I have planned, of course, to point out the issues that you will have to determine when you deliberate in the jury room, and the issues are determined by the statutes under which we have drawn the various counts of the indictment. I think I can recall the language of the statute which is Section 86 of Title 18 of the Code, which provides that if two or more persons in any way or in any manner conspire to defraud the United States Government and if pursuant to that conspiracy—here is the language: [2]

"If two or more persons conspire to commit any offense against the United States or to defraud the United States in any manner or for any purpose and one or more of said persons do any act to effectuate the object of the conspiracy, each of the parties to such conspiracy shall be punished" and so forth.

Now, it is readily observable that under that statute the offense is divided into two elements. First, there must be a conspiracy and, secondly, there must be an overt act carried out by one of the conspirators pursuant to the conspiracy.

Under that statute we have charged in Count 1 of the indictment a conspiracy to defraud the Government of the United States in two ways; first, by practicing fraud and deception on the inspectors and graders of the United States War Department, particularly the Veterinary Corps represented by Colonel Hand, and his associates and subordinates, and the United States Department of Agriculture, Mr. Moosman, Mr. Reed, and persons in their office.

Secondly, we have charged that the object of this conspiracy was to defraud the United States by selling and delivering to the Government eggs, butter and cheese of inferior quality and of lesser weight and price than that shipped out in these invoices, the several invoices we have here.

It is readily seen that the second object of that conspiracy follows more or less as a matter of course from the first, [3] for the purpose of practicing fraud and deception upon the inspectors would be

to sell the Government inferior merchandise at a higher price than they were entitled to.

In most of these transactions you will find the purposes of the conspiracy as alleged by the Government were accomplished. There will be several instances, one that I remember is the SS. William S. Clark, where there was no inspection required, consequently there will be no fraud, deception practiced on the inspectors; nevertheless, there will be a delivery and sale to the Government of eggs and butter, I believe, of an inferior quality.

Now, the conspiracy count further charges five overt acts and we must have proved one of them to your satisfaction beyond a reasonable doubt. Here, of course, the Government has the burden of proving all material elements of the offense beyond a reasonable doubt. His Honor will instruct you what a reasonable doubt is and I need not go into it in any detailed degree here. It does not eliminate all possible doubt. We are dealing with human beings, human testimony and human observations, and in dealing with such you cannot prove anything to a mathematical certainty; but we must prove our case and every element of our case beyond a reasonable doubt within the meaning of that term to this extent, that a reasonable doubt is a fixed doubt, a substantial doubt arising from the evidence or the lack of evidence; such a doubt as would cause any of you to hesitate [4] to act in important, serious, serious personal affairs that you may have.

This is a very serious matter. The Government feels it has been defrauded, and we have shown you

by our witnesses why we feel that way. The defendants are charged with a serious offense and they are deserving of your weighty consideration of all the matters, but if you feel beyond a reasonable doubt, as I have explained it and as his Honor will further explain it, that the Government has proved its case, then, of course, it is your duty to find the defendants guilty upon one or more counts of this indictment. But we must have proved at least one of these five overt acts beyond a reasonable doubt. Let me read them, or summarize them for you and then point out what we have proved with relation to each of the overt acts.

The first one that I am reading, from Paragraph 7, Subdivision A, of the first count of the indictment, provides that on or about the first day of February at the San Francisco plant of Nye & Nissen, the defendants Goddard, Menges and co-conspirator Nix, cut one-pound prints of butter, which were being inspected and graded by officials of the War Department, less than one pound and submitted sample prints of butter actually weighing one pound to said officials for inspection and weighing.

You will recall that Henry Pineda testified that on February 20, 1942—he recalled that day because it was four days, [5] or three days after the birth of his son—that on February 20, 1942, they were cutting some Army butter; there was an Army inspector present, and that acting under Goddard's instructions with Menges and Nix there helping he cut, or he adjusted the nozzle on the butter-cutting

machine so it would cut approximately one ounce short of one pound, and that when the inspector came around, which he did on perhaps seven or eight occasions, he would surreptitiously turn the nozzle so that the pound print would weigh properly, and the inspector would examine these scales and see that they were right, or that the butter was at proper weight and then leave, whereupon he would immediately turn the nozzle back and the butter would cut short again. There we have in detail this overt act of the indictment, the first count of the indictment. Our proof relates to February 20. The indictment said on or about February 1. His Honor will instruct you that we are not bound by the precise date, that "on or about February 1" includes as late as February 20. There is no question of that, as a matter of law.

The second overt act states that on or about the first day of June, 1940; again at the San Francisco plant of the defendant Nye & Nissen, the defendants Goddard, Menges and the co-conspirator Nix placed a stamp purporting to be a grading stamp of the United States Department of Agriculture on cases of eggs which had not been graded by United States Department of [6] Agriculture graders or inspectors, and our proof there is this: Andrade testified that about the time of the Democratic National Convention in 1940, which was within the month of June, 1940, and when he was filling a Navy order, that in the process of filling that Navy order Moosman would come to the plant to inspect and they would show Moosman certain trays of sample eggs

which they knew had been specially prepared and which they knew would meet the quality ordered and that Mobsman inspected a number of them and when he left they would buff off his stamp and stamp up a corresponding number of cases with the counterfeit stamp they had there and when he came back the next day to continue his inspection of the order they would show him the same eggs he had seen before with his stamp buffed off and perhaps a new label put on, and he would reinspect the same eggs time after time, perhaps five or six times.

The third overt act states that on or about February 1, 1942, again at the San Francisco plant of Nye & Nissen, the defendants Moncharsh, Goddard and Edward Menges and the co-conspirator Nix, switched eggs from cases of eggs which had previously been inspected and graded by officials of the United States Department of Agriculture and War Department and inserted in their place eggs of an inferior quality.

You will recall that Pineda testified to switching the eggs in that manner, eggs which bore the Veterinary Corps stamp or the Army Veterinary Corps stamp, that Ruby Goddard [7] called them late one afternoon and asked all these persons named here and some of the girls to come back after supper that evening, and that they did, and after supper they proceeded to switch these eggs from the inspected cases and replaced in those inspected cases inferior eggs. You will recall that he testified that Moncharsh and Berman came back that evening

with the others, that they tried to transfer eggs. I think they transferred one or two cases, but they were awkward about it, so they quit transferring eggs and let the girls do that and they proceeded to help Menges and Pineda with nailing up the cases. He also placed Andrade, Goddard and Nix as being present on that occasion.

The fourth overt act relates to one of the ships, the Cape Breton. It is alleged that on, or about May 10, the defendant Ruby Jutland Goddard caused 45 cases of eggs to be sold to the United States of America—War Shipping Administration, Matson Navigation Company, General Agents, and to be delivered to the S.S. Cape Breton at Pier 30 in the City and County of San Francisco, State of California, which eggs were of a lesser grade, weight and price than that represented to said purchaser. You will recall the Government produced the Cape Breton invoice which called for 45 cases of Medium AA Processed Eggs. Ranson was the driver who delivered that load. Ranson testified that Goddard instructed him what eggs to take. He told him to take his eggs from a certain tray and that when he was in the middle [8] of loading from that tray he carried over——

Mr. Faulkner: That is not the record. Ranson never said he ever saw the Cape Breton; never mentioned the ship.

Mr. Houck: Your Honor will recall Ranson testified he delivered to Pier 30, which was a pier at which the Cape Breton was——

Mr. Sullivan: No, he did not say that. Mr. Ran-

son stated he delivered to Pier 30. The "Cape Breton" was not used in one sentence of his testimony.

The Court: In any event, the Jury heard the testimony.

Mr. Houck: I will limit Ranson's testimony to the fact that he delivered eggs to Pier 30 on or about May 10, 1944, which is the date charged.

Ranson testified that Goddard told him what case to put in the load when he was loading his load; that Goddard came over with a hand truck containing ten cases of eggs, or perhaps two different trucks of five each, and he said, "Mix these in," and Ranson noted on the first time he lifted one of those ten cases, he found it considerably lighter than the others he was putting in, and he said to Goddard, "These are pretty light, Ruby; I don't believe I want to take this load," and Goddard answered, "That's all right, go ahead and take the load." Then he proceeded to load them up and that these ten cases, or approximately ten cases, were unstamped, bore no stamp of the Department of Agriculture; they bore the purple "P" and were [9] mixed in with thirty-six cases properly stamped by the Department of Agriculture and taken down to Pier 30 by Ranson.

Then we have Major Evans and Dallas Johnson, the FBI agents, the very next day examining this merchandise on the Cape Breton and we find that the cases of eggs were not AA eggs, but a no-grade egg, because they contained too high a loss which gave them no grade. The best Evans could give

them was a Grade B, not a Grade AA, but a Grade B, and that a lot of eggs, nine cases that were not stamped that contained the purple "P" averaged 33 pounds and 10 ounces.

Let me call your attention here to the United States Department of Agriculture Standards in evidence as Government's Exhibit No. 24, which provides specifically—bear in mind these were AA eggs, that being a grade of the Department of Agriculture which provides specifically that Medium eggs shall weigh, the minimum weight, the net weight be 40 pounds per case, and we find these nine cases weighing 33 pounds, 10 ounces, which is below even the minimum weight for Small eggs, which is 34 pounds.

So these nine cases of Peewee eggs were delivered to the Cape Breton as Medium AA eggs. Major Evans further testified that one of the cases was clearly a cold storage case of eggs, was not a AA, but a B grade and was an inedible cold storage. He called your attention to the Horse collar, he called it, that he could see through the candling light, which is the result of [10] storage for a period of time in cold storage refrigeration. I think he also observed that it was a cold storage case of eggs because of the type of rots. There was an interior mold which he testified was the result of a considerable period of cold storage, or being in cold storage.

The fifth overt act relates to the Cape Cumberland. You will recall with respect to the Cape Cumberland that on the tenth day of May Nystrom testi-

fied that on that day he saw Berman and Robinson scraping weights off the cases of cheese which had been set aside for him to deliver on that date, that he afterwards delivered that cheese to the Cape Cumberland and the very next day we have Special Agent Magee on the Cape Cumberland examining that cheese and finding that the cases all bore the Nye & Nissen factory number and there can be no doubt about the origin of that cheese, that all the weight markings were scraped off, and that the cheese was 104 pounds 6 ounces in weight instead of 112 pounds billed for.

In connection with the weight markings, let me call your attention to the fact that Berman testified that while he may have scraped weight markings off on occasion he never scraped them all off, he always left one on which he said represented the true weight of the cheese and we find that the inspectors on this occasion and on all other occasions when Mr. Magee and Mr. Johnson examined the cheese on any of these ships, with the exception of one that I will speak of later, the cheese [11] bore no weight markings whatever.

That is our proof under the fifth overt act of the conspiracy count and we think we have proved for you beyond any reasonable doubt those facts. We have certainly proved one of them, which is all that we are required to do.

In the light of our proof and our testimony it is apparent that the only real substantial issue in this case under the first count of the indictment is whether or not the conspiracy actually charged took

place. Now, in proving that a conspiracy existed we have to show two things. First, that the defendants, some of them or all of them, participated in a common scheme, a common plan to further a certain object. There must be first one common plan in which all participated. Secondly, we must show that the intent and purpose of that plan was to defraud the Government in the ways I have mentioned, in the ways pleaded in the indictment. Let me discuss first the intent, because I think I can speak of that in short order. The intent is perfectly clearcut in this case. This is not a case where they admit having done what the Government charges they did, but they say "We did it, we didn't know we were doing wrong, we had no intent to defraud the United States." If these defendants did what our witnesses testified they did, then their knowledge that it was wrong is so apparent and the intent follows so obviously from the doing of those acts that they cannot say they did not intend to defraud the United States. A man who [12] scrapes an Agricultural inspector's stamps off cases of eggs and then uses a counterfeit stamp and stamps a lot of unstamped, inferior quality eggs and then sends that out in the order which the Agriculture man is inspecting for, cannot be heard to say that he did not intend to defraud a Department of Agriculture inspector. If he did the act the intent then follows more or less as a matter of course.

The question of whether or not these defendants entered into a common scheme, a common plan, is really the most important issue in the first part of

the indictment. His Honor will instruct you, I believe, that we don't have to prove any formal agreement. These conspiracies are not entered into by a group of men sitting around a table discussing pros and cons to accomplish an object and then coming to a common understanding. In this type of case the apparent way that the conspiracy would occur would be for the boss, the president, Abraham Moncharsh, to set up a certain standard, a certain method of doing business and to surround himself with subordinates who shall carry out that business in the way he wanted, to whom he would then give the general orders. The details would be supplied in this case by Mr. Berman and Mr. Goddard and perhaps carried out by the floor man, Menges, Pineda and the others, Nix. That is the type of conspiracy that we have charged and that is the type of conspiracy that we have proved. You can infer by circumstantial evidence from the numerous instances [13] that we have related, that our witnesses have related to you, that the general scheme of doing business in a certain way was entered into, and if you find that that general scheme was entered into, then any person knowing of that general scheme participated in it in any way, thereby joins or becomes a co-conspirator, and becomes a responsible along with any other members of the conspiracy, and he becomes responsible even if he does not know what some of the other conspirators are doing, even if he does not know all the details of the conspiracy. It is sufficient that he knows of the manner of doing business and that knowing that

he aids in its accomplishment or performs such act as nailing up a case of eggs that have been switched, or scraping weights off cheese, or doing any of these many things that have been related. So the real problem for you to determine in that one, and, of course, it is true of all the other counts of the indictment, is, did the defendants and did each of them do the things which were related by Government witnesses?

All of these things have been testified to by our witnesses. Most of them have been testified to by more than one, and all of them in some detail have been denied by each of the defendants. It is up to you to determine which to believe, the Government witnesses on the one hand, or the defendants on the other. That will bring you to a consideration of the credibility of the witnesses upon both sides. [14]

We contend that our witnesses are the credible witnesses in this case. We believe that they are and it is my primary job here to tell you why we believe that and to convince you that Pineda and Andrade, Nystrom, Ranson, Colonel Hand, Major Evans, the FBI agents, are to be believed, rather than the defendants in this case.

Let me take up Henry Pineda. Henry Pineda was a floor man at the plant. He worked from some time in 1934 up to 1942. He quit in 1942. He came back for a few months in 1943. I think he did night work. Then he left the employ. You saw him on the witness stand. Henry Pineda was as fair, as open, as sincere a fellow as I have ever heard on a witness stand, and whom I think that you have

heard. There was no hesitancy in relating the details. There was no attempt to excuse his own participation in these things. He readily admitted that he had participated. He did not try to put the blame on Goddard or on Berman or Meinges. He readily admitted participating, and he withstood cross-examination particularly well. You will recall his cross-examination was severe. He related the instances up there on the stand upon cross-examination dealing in the smallest details that Mr. Faulkner asked for and he admitted he didn't know for a certainty, he had never seen the purchase orders and in some cases he didn't know where the delivery of the eggs was to be. He was not expected to know. He was a floor man. He worked on the floor. He didn't see the [15] orders and he admitted that. When he made a mistake concerning Colonel Foster he readily admitted it and he explained to you how it happened. It was a reasonable mistake. Colonel Foster came there one day with Colonel Keelsmeier. Colonel Keelsmeier was the only man in uniform. Colonel Foster was in civilian dress. He had heard about Colonel Foster before. He heard the name Colonel Foster mentioned and these men were introduced and he merely assumed the man in the uniform was Colonel Foster. He had this man fixed in his own mind as Colonel Foster and he identified him on the witness stand as Colonel Foster and when it became evident that he had made a mistake he readily explained it. I don't believe that is something to be considered against the credibility of Pineda, but on the other hand, it is in his favor.

because he clearly admitted the mistake and explained it and he gave a reasonable explanation.

Another element to be considered in determining whether the witness is to be considered credible is his relationship with the defendants. Is there anything in that relationship that would give rise to the belief that there was some bias on the part of the witness against these defendants? You recall the relationship between Pineda and his employers was particularly good, no possible bias was shown; the relationship at all times was friendly. There was no criticism of Pineda except, I think, somebody spoke to him once or twice about being [16] too friendly and talking too much with the girls, but aside from that it certainly wouldn't raise any bias. There was no showing of anything in the relationship of employee and employer that would give rise to the belief that Pineda held a bias against his employers. On the other hand, the very absence of such a factor indicates that he was a man, an employee, who was subpoenaed by the Government to testify in the case and he testified as to what he did, what he saw, what he observed, and who instructed him to do those acts.

Another element to be considered on the question of credibility is any adverse interest that he might have. Of course, Henry Pineda was not indicted and on cross-examination Mr. Faulkner made quite a bit of that fact. But Henry Pineda testified without any promise having been made to him. The Government had not promised him any immunity. He testified he knew he was doing wrong, that he

might be indicted, that he knew that. That should sufficiently dispose of any contention that he might have an adverse interest in testifying as he did. Bear in mind also that by admitting what he did and knowing that he was doing wrong, Henry Pineda became an accomplice. The testimony of an accomplice in a Federal court is sufficient in itself upon which a jury can base a verdict of guilty. If we had rested immediately after the testimony of Henry Pineda we would have had enough to go to the jury on the conspiracy count. We would have enough to find a verdict of guilty [17] on the conspiracy count. There is no requirement in the Federal courts that the testimony of an accomplice be corroborated before it can be used by the jury to convict. The testimony of an accomplice should be relied upon by a jury with caution and should be viewed with caution unless it is corroborated. We accept that rule of law and we urge you to seek corroboration of the witness Henry Pineda. We know that we are in a sound position to do that because there is so much corroboration of his testimony, Pineda's testimony.

What is that corroboration? He testified about Peewee eggs. They disposed of these Peewee eggs under Goddard's instructions. You recall they stacked them over on the side and you recall that when Nystrom and when Ranson were given Peewee eggs to mix in with their loads, that Goddard directed them over to that place near his office and in that connection you will recall that Goddard testified that he had marked on the floor of the plant where certain grades of eggs were to be put,

the AA eggs were to be kept in a certain place and the A eggs were to be kept in a certain line, and that all qualities of eggs in that plant were to be kept in a certain place. Here we find the Peewee eggs which Pineda and Menges on this prior occasion put over near Goddard's office. We find that same place used to store Peewee eggs.

You recall the occasion when the Petaluma truck driver was down. Pineda testified he was sent to the waterfront. [18] Smiley was down with his truckload of eggs from Petaluma. On that occasion Smiley would order certain cases put in the bottom of the pile and other cases on the top, and so on. Henry Pineda discussed it with him and he found out the cases that were going to the bottom were the sample cases which were the cases the company wanted the inspector to look at.

You will recall that he is corroborated in that story by Andrade, who testified to precisely the same type of situation occurring once before, according to Andrade, when Smiley came into the plant with a truckload of eggs destined to Fort Mason. Goddard sent Andrade along with him to unload, or help unload the cases and said in Andrade's presence, "Smiley will tell you how to unload the cases." When they got to Fort Mason Smiley pointed out certain parts of the load and they deposited all those cases in the bottom of the load, covered them with sample cases. So there we have precisely the same situation involving the same man, Smiley and his cut-outs and sample cases from Petaluma.

Then, of course, in the transferring of eggs, Pineda was corroborated by Mrs. Bryant, the candler whom we had here to testify. He gave a number of instances of transferring eggs over a period of time. Mrs. Bryant testified to a single instance occurring in 1940. He is also corroborated by the instance at the Merchants Ice and Cold Storage Company. You will recall that Goddard told Pineda that Saturday afternoon [19] that he could not play soft ball because they had been caught red handed by the Army and had to take care of that right away, and they went down to the Merchants Ice and Cold Storage Company. There they found the inspectors going through this lot of eggs, picking out those with double-wire marks, those new cases with double-wire marks, because they had been wired up, the eggs had been switched and they had been wired up again evidently making two wire marks. That is why Pineda and Goddard were there; they were helping the inspectors uncover those eggs with the double-wire marks. You recall Henry Pineda testified that Goddard told him to scuff his shoes and Goddard did likewise on these cases so as to obliterate if possible the wire marks.

Of course, there is a great deal of other corroboration. You will recall he testified to defacing the chalk marks which Colonel Hand and some of the other army inspectors put on the sample cases when they picked cases from the lot. They would have a sample case made up and at the door, the Bluxome Street door, and they would bring that in, put a-

chalk mark on it similar to that of the Colonel. In this connection I might point out that the Army eventually got suspicious, because after first using the chalk mark which is easy to deface, Colonel Koedsnicht began using the brush mark, the stencil brush with the purple ink, all of which indicates the Army began to suspect that the marks on the sample cases were being [20] defaced and they got ahold of a little different type of mark. You remember that at one point Goddard brought in some purple ink and a stencilling brush and that was used to deface the Colonel's mark. About the buffing off of the inspection stamp, the use of the stamp and replacing a lot of inferior eggs in the cases that were buffed off, that was corroborated by Andrade who told a story similar to that related by Pineda in that connection.

Finally, we have the cutting of the butter short. We have Pineda's testimony he cut butter short. On one occasion he testified they not only did that, but it was rejected butter, and that butter was placed in the containers there with the lot of butter delivered to the Army under the stamp of the Army inspector. In this he was corroborated by Menemier, who testified that in August, 1943, he was inspecting——

Mr. Faulkner: There is no corroboration of that event. He left the employ in 1942. The Army did that act in 1943 or '44. There is no evidence to justify that argument that that is corroboration.

Mr. Houck: It is proper to argue Pineda's story to show that any practice which is carried through

this year and a half after he testified, to the time when Mencimer found these short-weight cases of butter.

Mr. Faulkner: The type of corroboration that is required—your Honor in the State court is familiar with it—after [21] an accomplice testifies to a fact someone who is also familiar with that particular fact may corroborate him, in order that the accomplice's testimony is corroborated, but to make an argument under the law and the facts that a man working down in a place in 1941 is corroborated by something that happened five years later when he was not there, and the element of time does not make any difference, that is the basis of your argument—there is no basis in this record for corroboration of Pineda or anything that a man saw or observed years later. That is not corroboration within the meaning of the law.

Mr. Houck: I submit, your Honor——

Mr. Faulkner: The law is clear on it.

Mr. Houck: (Continuing) ——that when Mencimer found each case of these cases he says precisely four pounds short——

Mr. Faulkner: Eastern Cut Butter.

Mr. Houck: I can argue that that was a situation which continued, was a practice described by Pineda, even though it may have been a year and a half before.

Mr. Faulkner: He can argue the testimony under the law and under the facts. He cannot state that an event in 1943 has any relation to corroborate the credibility of a witness in 1941. That is my point.

An argument like that is not proper in a case.

The Court: Proceed, gentlemen.

Mr. Houck: Aside from voice corroboration by other witnesses, the basis of corroboration of Pineda's testimony is [22] the corroboration of the actual inspection of the merchandise delivered by the Nye & Nissen plant. In other words, what we have established, for instance, by Pineda's testimony we have established and shown a practice of doing business in a certain way over this period that will result in the delivery to the Government agency of inferior quality merchandise and here you will recall Colonel Hand in the early fall of 1941, while Pineda was still at the plant, at the time he was called in to inspect some cases of eggs at the Letterman General Hospital, at the bakery shop there, that he saw three cases, that they bore his stamp, and that three days before that occasion upon inspection he found they were 5 per cent inedible, and they contained eggs with various defects, which defects would have clearly showed up on an inspection, a candling inspection, such as he had put those eggs through three days before.

It is true these eggs may have been different eggs of the same lot that he had inspected before, but you will recall that the obligation on the part of the defendants it to distribute a uniform lot of eggs and it is grossly improper for the defendants to show Colonel Hand certain eggs and to have other eggs in that same lot Inedible Rots of various degrees.

A similar corroborating circumstance is Colonel Hand's testimony about the eggs he examined at

the Army Headquarters Mess about the same time also at the Presidio. These eggs he [23] examined bore his stamp of two days before. On each occasion there were 10 per cent Inedible eggs; eggs unfit for human consumpfion, consisting of Black Rot, Blood Rot, and with a strong disagreeable odor.

For the best instance of this type of corroboration is the matter of the William S. Clark. On the William S. Clark, that involved 45 cases of Medium Processed AA eggs were ordered. We put the inspectors on the stand here to testify. I believe they said there was at least 10 per cent, perhaps 12 percent of these eggs that were inedible, unfit for human consumption. They contained Rots. Foster and Colonel Hand both testified about two-thirds of the eggs were bad and could not be used. As a matter of fact, only 10 per cent of them were actually inedible, but you recall that those eggs were graded as 30 per cent C. The point is that a C egg is a trade egg and is not sold for human consumption direct. You will recall those eggs had been down in cold storage in Los Angeles and that they were brought up here. We showed how they were brought up here, at the instance of the defendants here in San Francisco. They were then put on this ship. They were taken down and during the voyage between here and Long Beach they were found to be in the condition that I have outlined. What has been the defendants' explanation of that instance? Goddard testified that, sure, he remembered bringing these eggs up from Los Angeles; he couldn't recall other shipment that [24] involved in this case, but

he did remember bringing up these eggs from Los Angeles and he remembered specifically that the eggs were transferred, that the eggs, the cold storage eggs in these cases were transfered out of these cases and that new AA Medium Processed eggs were put in them.

Mr. Faulkner: That is an apparent misstatement of the case. Mr. Goddard stated, his testimony as to how that was, that he had no recollection at all of the eggs coming from Los Angeles, but he recognized his signature on that paper and he remembered nothing else about it, but he did remember the filling of an order from the William S. Clark——

Mr. Houck: I submit, your Honor, he testified that is his signature on this receipt showing the delivery of the cases from Los Angeles.

Mr. Faulkner: He had no recollection of the instance. That is according to his testimony.

The Court: If there is any question about his testimony I think the record is clear. We will take a recess for a few minutes.

(After recess.)

The Court: You may proceed.

Mr. Houck: I think we can all agree on what was said. Now, Mr. Faukner was correct in this respect, that Mr. Goddard did not testify that the eggs which he used to fill the Clark order were transferred into the wooden cases that came up from [25] Los Angeles. He testified that it was the practice of the company to use those wooden

cases on such orders. He testified that on the occasion he filled the Clark order he did transfer AA eggs from fiber cases to wooden cases, but I submit that it is a perfectly proper inference and it is the only inference when you consider the fact that the wooden cases that were sent to that boat bore Lot No. 3737, the only inference is that he transferred from these fiber cases, this is his story, of course, that he transferred from the fiber cases to these wooden cases that came up from Los Angeles, they are the same cases, bore the same lot number, they were off that boat and they were the cases that were in cold storage in Los Angeles for ten months. The question is, where did the eggs come from?

Mr. Faulkner: No.

Mr. Pratt: If the Court please.

Mr. Faulkner: Just a minute. I have the right——

Mr. Pratt: I don't think Mr. Houck should be interrupted.

Mr Faulkner: I only request the record be kept straight. The testimony of Mr. Goddard——

The Court: You will have an opportunity to read it at the proper time. Let us proceed, Counsel.

Mr. Houck: The question is, where did the eggs come from. Expert after expert that we put on the stand testified that these were cold storage eggs, that the defects were of a [26] type that only came from long periods in cold storage, that the lot numbers on the cases were the same and that the eggs that they saw could not possibly have been AA eggs within a period of a month, and it was only, you

will recall, from the 18th of October to the 2nd or 3rd of November that these events occurred.

Now, in addition, you may remember that these cases came up from Los Angeles, they left Los Angeles on October 15 at 2:00 p.m. That is the stamp on one of the transfer papers we have in evidence. They left at 2:15 and they should have got up here on the morning of the 16th. The 16th of October, 1942, was a Saturday, and you would have, Mr. Goddard, assuming he transferred eggs which the evidence shows he did not, but even if he did he would have had to have done it on Saturday or Sunday, and Sunday being a holiday; in other words, that he in all probability didn't transfer those eggs during that period, and on the 18th, the morning of the 18th, they were delivered on the William S. Clark. Perhaps the most conclusive testimony in that respect is this box. The top slats on that box are warped to some extent and there was some difficulty in finding the holes on the cover to hold the top on the case, but they were there, and on each end of this case are six nail holes regularly spaced, indicating that at one time six nails were put in each side of the cover holding it down. You can examine that in the jury room. If the cover had been [27] taken off and the contents transferred out and good eggs put in, then where the covers were nailed up again there would be a complete double set of nail holes on each end of that cover and no double set nail holes—I mean, a double set of nail holes would total at least twelve nail holes on each side of the cover, and you can

look all you want and all you will find on each side are six nail holes, individual nail holes. That is as convincing evidence as any.

On the William S. Clark, you remember that Frank Gartenberg inspected the butter and found it rancid and the company thereupon issued a credit memorandum for it. In this case they made some point, they brought a man out here who said it was not rancid, the butter he examined was not rancid, but had a taste of vegetables presumably kept in the same room with the butter. But don't forget the testimony of Homer Foster, the night cook, who said that in the same room with the butter they kept milk.

The only other attack on this evidence of the Government is as to the refrigeration on board the William S. Clark. I am not trying to minimize the testimony of Haffel Brown. He did say that on one occasion he noticed a red light on the outside of the refrigerator, the red light being to indicate that at the moment the refrigeration unit was out of order. He reported that immediately. It was corrected in a matter of minutes and he said it could not have possibly caused the [28] defects which he found in these eggs. But even assuming that it might have been long enough to cause defects, as I understand it, he went on board that ship before any of these stores went on, prior to October 14, when an order of five cases of port stores from Nye & Nissen went on board that ship. The second day would then bring it up not later than the 16th, and it was on the 18th that the stores we are talk-

ing about were put on board that ship. So that means that when he saw that red light which indicated the refrigeration was out of order that was before these eggs got on board and could have had no possible effect on them. It is true that he did say that the engineer, whoever it was, who had charge of the refrigeration, tinkered with it throughout the voyage, but he said the refrigeration was good throughout the voyage and that is borne out by the fact that the eggs they did put on when they finally did get the AA eggs at Long Beach after they had taken these other eggs off, that those eggs were good throughout the trip away out to the South Pacific and all the way back and those were goods eggs throughout the entire trip and they were kept in the same storage room under the same refrigeration conditions. That is followed by the Hawaiian Shipper, which is the only other ship that I will take up in any great detail. On that ship 400 cases of Large Grade 1 eggs were ordered. That was on December 5. The order was billed December 5, 1944. We brought Debes, the chief steward, and Dolyn, the chief cook, [29] and Oearsson, the chief baker, on the Hawaiian Shipper, to testify that the minute they started using the eggs from this lot they began to run into rotten eggs. They all testified that one-third of the eggs they brought up to use were completely rotten; they had various defects, they had a strong sulphur-like odor. Another third were in such condition that they could not cook with them; Dolyn told you he could not fry them, he could not boil them, he scrambled them

and he had to put in mace and nutmeg to make them edible. The other third were edible eggs and they used them.

The attack on these eggs always is as to refrigeration. There was nothing the defendants could bring out about the refrigeration. These three persons all testified the refrigeration was in good working order. It was Oscarsson, I believe, who testified it was the best icebox that he ever saw. In any event, the refrigeration could have nothing to do with the fact that as all three of those persons testified there were whole layers of eggs missing and these layers of eggs were missing not from the top. Isn't that the typical result of doing business the way these men were? A. The defective or missing layers or small eggs would be on the bottom. If an inspector made a cursory search he would look at the top layer, it would look all right and he would think that the bottom layer would be all right; but the defective eggs, the small eggs and the missing eggs, of course, were on the bottom. The [30] refrigeration could not be blamed for the missing layers of eggs.

Now, we corroborated Pineda by the testimony of other witnesses, the testimony of the inspectors, and let me say that the only witnesses to contradict him are the defendants themselves, Goddard, Moncharsh, Menges and Berman. Incidentally, let me here point out something I should have pointed out before. We have evidence of a corporation, a corporate defendant in this case. A corporation is a legal entity that cannot act by itself. It has to act

through its human agents. In order for a corporation to be found guilty of a crime such as this, the Court will instruct you that a corporation is responsible similarly for the acts of its officers and agents committed within the scope of their operations and committed for and on behalf of the corporation. When Nye & Nissen, Inc., set us as president Abraham Moncharsh it delegated to him the operation of the business and if he then runs that business in a manner which our witnesses have described, that corporation becomes responsible for Abe Moncharsh's acts and it is responsible just as much as he is responsible. In determining whether or not the corporation committed these acts that we have charged, the corporation is criminally responsible under each of these counts, it is your job to determine whether some agent or some president or some officer of the corporation delegated certain duties acted within the scope of those duties [31] for the corporation and committed these acts. Of course, all these acts were committed for the corporation. The purchase orders were in the name of the corporation. The profits went to the corporation and there were corporate acts.

Let's see who could have contradicted Pineda among Goodard, Menges, Moncharsh and Berman. How has Goddard stood up on cross-examination? How does his story fit in with that of the others? I have already referred to his testimony about the Clark, which I contend very seriously cannot be believed, and that anyone who would testify that he took AA eggs from fiber cases, I mean, put AA

eggs from fiber cases into wooden cases and sent those cases on to the Clark and in this instance, under those circumstances, showing what we have about that incident on the Clark, simply cannot be believed, and having been unbelievable in one instance I submit that you cannot credit his testimony in any other instance.

In addition, Goddard, of course, is contradicted by Ranson, who testified to the instructions which Goddard gave him in connection with instructions about the Cape Breton or the Pier 30 delivery.

Goddard is contradicted by Nystrom, who related a number of instances, conversations between Goddard and Berman and in which he took part. Of course, Goddard denied the statement of Andrade. So we have Goddard contradicted by Pineda, by the circumstances on the Clark, by Ranson, by Nystrom and by [32] Andrade, and by the fact that on all those occasions we find defective merchandise aboard the ships of the War Shipping Administration, defective merchandise shipped to the Government in connection with all of these orders, and I submit that Goddard cannot be believed.

The other person contradicting Pineda is Menges and Menges' story is wholly without credit. He was specifically impeached by these five girl candlers that we brought before you. We asked Menges whether he ever transferred eggs out of inspected cases. He said he did. He said he did it on a number of occasions, it was a common practice, but we asked him if he ever transferred eggs out of

inspected cases and in their places put other eggs from unstamped cases. He said no, he did not.

Mr. Faulkner: That is not the testimony. That is a misstatement of the testimony. You asked Mr. Menges if he transferred eggs out of inspected boxes and substituted in their place inferior eggs.

The Court: Proceed.

Mr. Faulkner: That is not the record.

Mr. Houck: The question I read from the record about these particulars related to other eggs and not necessarily inferior eggs.

The Court: Proceed.

Mr. Houck: Of course, Mrs. Valdez, Mrs. McKenna, Mrs. [33] Mathesen, and Mrs. Higuera all got up here on the stand and testified before you as to what happened during this period. They, of course, would have no possible reason to tell something untruthful, whereas Menges has every reason in the world to color his testimony and to falsify it.

Moncharsh was specifically impeached by Colonel Hand and also by Colonel Foster and by the two FBI agents, Dallas Johnson and Magee, and by his own subsequent admission in the case of this complaint that was made. That instance is a very good example of the worth, the credibility of Moncharsh's testimony. He said he didn't recall ever receiving a complaint or having a complaint called to his attention. We showed him one letter; we showed him two letters, both called to his attention by Berman. He said he never saw them. Finally we showed him a letter in which he admitted seeing them in the letter, rather, the letter states in words

to this effect: "Your letters of previous date have been referred to me for answer." There, of course, Moncharsh could have said, "Yes, and now I recall that I did see those letters; now I recall that I saw them and this is my letter in answer." But Moncharsh did not say that. Moncharsh said that "I still didn't see the letters; I do recall Berman calling that complaint to my attention, but I never saw the letter; that is something the girl made up and put in that letter". Well, the four or five paragraphs of that letter is a quotation from the previous [34] letter and he admitted that he dictated that quotation. When he admitted that he, in effect admitted seeing the previous letters, and finally he was forced to give us some sort of an admission and, well, he may have skimmed through them. That is precisely what Moncharsh's testimony is worth.

Now, Berman. We specifically impeached Berman. Berman testified that these cases of cheese always bore weight markings. The agents, when they examined the cheese on board the ships found no weight markings upon them with only one exception. Let me tell you about that exception. Nystrom testified there was one case of cheese, some kind of cheese, that bore the weight mark "56 pounds". He testified that he checked that against the invoice that was given to him to take along with this load and noted that that cheese was billed as 65 pounds. He called that to Berman's attention, and Berman said, "Well, that's all right, we will let it go and see what happens."

Ladies and gentlemen, this precisely is what happened; Berman may not have expected it, but that is what he got, that is what he deserved, and that is what a man with a little different frame of mind than Berman might have expected. In addition to that, you remember it was brought out clearly that Berman as head of City Sales purchased cheese from Nye & Nissen, or, rather, a credit transaction was had. At any rate, the cheese was transferred by Nye & Nissen, Inc., to City Sales at 24, 25, 26 pounds per unit, whether it was a wheel or a loaf, [35] I don't remember. Time after time after time, I think there were twenty-one instances noted on the exhibits in evidence, the Government was billed for this same cheese during the same period at 30 pounds a unit. Berman said in effect that "that is Nystrom's fault, I told him to get 30 pounds, 60 pounds, whatever it was, and he didn't obey my instructions". Well, how could Nystrom get 60 pounds of cheese in units of 24 and 25? Two of them would be 50 pounds, three of them would be 75 pounds. He could not possibly get 60 pounds of cheese, and Berman knew it.

In addition, you will remember that Dallas Johnson, while he was there, he was getting the records from Eichler, he found that the City Sales division during certain periods in getting this cheese from Nye & Nissen were intentionally and deliberately raising the weights on these units of cheese when they sold them to the Government.

Now, referring to Andrade. Andrade also made no effort to excuse his own part in these wrongful

acts. He admitted he knew he was doing wrong and he did not attempt to hide that fact. He also exhibited to Mr. Faulkner no hesitancy on the details that were asked him on cross-examination. His story is also corroborated. He told about a delivery of eggs to the Presidio that were rejected. He said that Goddard told him around that time, either that time or another time, that Goddard told him to get there just before closing time, [36] or quitting time, or lunch time, so they would give only a cursory inspection and that when he did that, that lot was accepted and it became the property of the United States. We showed the attitude there. We showed how the Government got the cut-out eggs. We showed it at the other end, the kind of eggs the Government got. We find these inedible eggs that Hand found. He was corroborated by Pineda on those details in the sense that Pineda related the same type of situation. It appears that the same thing happened time and time again. Regarding the transferring of eggs, he was corroborated by Pineda and by Mrs. Bryant. As Pineda did, Andrade left sore at the company. There is no doubt about that. He testified he had been unjustly treated in an instance with which we have no concern, but he related the circumstances and his conversation with Goddard. That was in 1940, but the FBI didn't go there until—Andrade said it was not until 1944 that he was interviewed. I think the record shows May, 1944, that he was talked to by the FBI agents and there was no occasion for him to begin to feel four years later that

he should get even with the company and, in fact, he did not, because the testimony was he was contacted by the agents. There is no reason to suppose that in 1944 and now in 1946 that he testified against the company because of some old grouch. He, of course, is also an accomplice. He testified he knew he was doing wrong. His testimony is subject to some caution as that of [37] Pineda, but we ask you to consider the corroboration of Andrade's testimony.

Now, regarding Nystrom. His only objection was that just before he left that he was tired of the way they were doing business and wanted to get out and in a sort of naive way thought, he had to have a good reason, so he told one of the defendants on April 1 that he needed some more money and he was going to quit. Then the incident about the hundred dollars came up. Berman testified that Nystrom told him that he was in difficulty, in the clutches of the FBI. Nystrom said that is not what he said at all. He related an incident about the Internal Revenue, about some difficulty with his income tax. Of course, you all know it is the Internal Revenue Department and not the FBI that handles the income tax money. There is no doubt that it was Nystrom and not Berman who told the truth on that point. Berman testified he thought Nystrom connived with somebody, he did not know whom; he said he did not think it was the FBI, it might not have been the FBI, although his talk about Nystrom being in the clutches of the FBI indicates that is what he meant. You saw Nystrom

on the stand. You heard the testimony. He is not the type of person who connives with anybody. If he did not connive with the FBI, whom did he connive with; was it some competitor to put the company in a black light? According to Goddard and Berman, there were not that many Peewee eggs in the plant. Yet he got [38] Peewee eggs from somewhere. We have a showing of 50 or 60 cases of Peewee eggs that Nystrom delivered in this short period. Yet Berman testified he did not recall more than three or four cases being in the plant.

The same applies to Ranson. He was just a relief driver and on one occasion was instructed to mix in Peewee cases. It is true they did speak to him once or twice about his drinking. On redirect examination I asked him whether he had had any drinks before this occasion, to which he testified, no, that he had not. There was no showing he had any feeling against his employers. Major Evans and the FBI agents and Colonel Hand and the other Government employees, they hold responsible positions, they are men of integrity and I am not even going to defend their credibility. If Mr. Faulkner or Mr. Sullivan want to attack it, we will address you about that on our closing argument.

With respect to these deliveries of Peewee cases of eggs, we find on the Cape Pillar 10 Peewee cases were delivered out of 45, when Medium A eggs were ordered. The order was no grade because of the inedibles. We have evidence of samples of the eggs taken from the Cape Pillar. There was testimony there that the eggs were pock marked. You

have seen those eggs there. You know they are very small. They are eggs not much bigger than a man's ring. Nystrom testified they were a little bit bigger than his ring. He testified these were a sample of [39] what he said. There were some smaller than that even in the eggs he delivered.

On the Phillipa, 35 cases out of 65 were Peewee eggs; Medium AA eggs were ordered and Small B eggs were delivered.

On the William S. Clark, 6 Peewee cases out of 40; Medium AA eggs were ordered. Small B eggs were delivered. When AA eggs were ordered and B eggs were delivered, that is two grades drop in quality and one in size.

On the James Oliver Medium AA eggs were ordered. One of the cases contained 98 per cent dirty eggs, dirty eggs being eggs not acceptable by the War Shipping Administration.

On the Cape Breton 9 cases out of 45 were Peewee eggs.

In connection with cheese, on the Cape Cumberland order the weight marking was 112 pounds of California Loaf cheese ordered and 104 pounds 6 ounces delivered and they found no weight marking whatever.

On the Heber Creel, Romano Dolce cheese was billed at 65 pounds and 54 were delivered. That was the occasion, I think—the box was marked 56. That was the occasion when Berman said to take it along and see what happens.

Again, on the Cape Breton, California Loaf cheese delivered billed at 84 pounds and weighed

77. The Romano Dolce was billed at 63 pounds and weighed 53 pounds, 14 ounces.

Now, the last six counts I will cover in a hurry. They are substantive counts of the indictment and were drawn under [40] a particular statute. That statute provides that anybody who makes or uses or causes to be made or used a false claim, bill, voucher, and so forth, including invoices, knowing that the same contains a fraudulent and fictitious statement, a fraudulent or fictitious statement, is liable under the said statute. Under that statute we have drawn six substantive counts. The issues under each of those substantive counts are these: In the first place, were the claims fictitious and fraudulent? Did they contain fictitious and fraudulent entries? Secondly, were they made or used in a matter within the jurisdiction of an agency of the United States? Now, we know they were made up in connection with shipments to the War Shipping Administration. There is no doubt that that is an agency of the United States. They were made in connection with, and the Court will instruct you, I believe, that the use of these particular invoices is, as a matter of law, a making and using within the jurisdiction of this agency of the United States within the meaning of the statute.

The next element is, did the defendants and each of them cause these invoices to be made? Were their claims false? Did the defendants cause them to be made and, finally, if so, in so doing did they know what they were doing? Did they know they

were dealing with invoices which contained these false and fictitious statements?

As to the first, were the claims fictitious and fraudulent? [41] We find Count 2, on the Cape Charles, 4 Peewee cases out of 36 with Medium AA eggs being ordered. That same ship, there was some Cheddar cheese billed at 240 pounds that actually weighed 141.

The Mission San Diego, Count No. 3, Medium Processed AA eggs were ordered. Those eggs received a Small B grade, they were not stamped by the Department of Agriculture. They were not processed and they did not meet the standards set up. In that connection, let me call your attention to this fact: This was only an order for 10 cases. Berman specified that on those small orders sometimes the Department of Agriculture said, "If you haven't any stamped cases on hand, why, you can send a man out with 10 cases, send them along anyway." When Goddard got on the stand he testified with respect to each of the ships on which he delivered, or which he was responsible for, that at all times there were a sufficient number of Agricultural inspected eggs on hand to make a delivery. One of them has testified falsely, Berman or Goddard, and you can take your choice.

Also involved on the Mission San Diego transaction was Romano Dolce cheese, which was billed at 65 pounds and actually weighed 57; Cheddar also billed at 30 pounds and actually weighed 24 pounds.

On the Francis W. Parker there were 9 Peewee

cases out of 47. Medium AA eggs were billed for and small B were what they [42] received.

On the Gilbert Hitchcock, 14 cases out of 55 were Peewees and Medium AA eggs were billed for and Small B eggs were received.

On the Czechoslovakian Victory Medium A eggs were ordered and billed for and Small C eggs delivered.

On the Henry White 9 cases of Peewees out of 50. There is no doubt that Berman caused his claims to be made and Goddard caused his, so, presumably, the only question in this case is, did Menges and did Moncharsh have any part in these claims. Moncharsh was the president, he was the director of the business policies. Whenever he was in town he was there at the plant; Mrs. McKenna so testified. He kept a close touch on the business affairs of the company and under those circumstances, isn't it self-evident that he originated or was responsible for all of these fictitious practices, and he was the one who was the guiding spirit? He it was who surrounded himself with these subordinates who would carry out his plans. Under those circumstances there can be no doubt that Moncharsh is equally guilty with Berman and is equally guilty with Goddard.

Menges is a little further removed. He was a subordinate. He was a floor man; but Menges, you will recall all of these counts show Peewee eggs were delivered and Menges is responsible for the accumulation of these Peewee eggs. He is the [43] one who took them from the candlers. You remem-

her the testimony that Menges would put them over by Goddard's office for Goddard to use on these ships. If he knew that Goddard was using those eggs to fill all these orders, which he must have known, that Goddard was using them for deliveries of Medium eggs, then he, of course, knew what was being done and then he is just as responsible as Goddard for these cases which Goddard mixed in with his deliveries. It makes no difference that he perhaps did not know of the Czechoslovakia Victory. He may not have ever heard of that ship. He may have never heard of the Henry White, the Mission San Diego and the other ships. All he need know to be a party to the substantive count is that these Peewee eggs that he is setting over there for Goddard's use are mislabeled and will ultimately be used for delivery to the War Shipping Administration, which we have clearly demonstrated.

Now, on the question of intent, there can be no question but that Berman and Goddard knew what they were doing. That is the only possible inference, that they intended to defraud the United States. I have only one more comment to make and then I will close an argument that has been much too long.

What have we here? We either have a conspiracy on the part of these defendants to defraud the United States, a conspiracy entered into by the defendants to defraud the United States in a manner described in the testimony here and [44] from these witnesses, or we have a conspiracy by every one of the Government's witnesses to come in here and to

falsely accuse the defendants, to commit perjury and to testify falsely, to aid in a conspiracy against their former employers. If we had a group of employees who knew each other, who had a common interest, who would injure or wish in some way to injure their employers through some fanciful grievance, there might be some cause to argue that these employees came in here and faked a story that they knew was false, but that is not what we have here. We have Gartenberg in Los Angeles, we have Andrade who worked from 1939 to 1940, we have Pineda, who worked from 1932 to 1942. We have Nystrom, who didn't even know Pineda. We have Ranson, who didn't know Pineda or Andrade, and Ranson and Nystrom didn't even know each other. We have Mrs. Bryant, we have the candlers, the other candlers who knew—of course, they were acquainted with each other, but who did not know Andrade, except casually. Mrs. Valdez knew Pineda, the others didn't appear to know him except casually.

In closing, I want to leave this thought with you, that we have either one of two things here; either we have a conspiracy of disgruntled employees coming in and testifying against their former employers with a faked story, or we have the conspiracy charged in the indictment, a conspiracy by these defendants to defraud and deceive the Government for the purpose of selling, delivering defective eggs, inferior eggs, [45] and eggs of a lesser weight and quality to the United States. Thank you.

The Court: Ladies and gentlemen, before you leave I again desire to admonish you that you are not to converse with anybody about this case, you are not to permit anyone to approach you discussing it; you are not to form or express an opinion until the matter is finally submitted to you. We will adjourn until ten o'clock tomorrow morning. You may be excused.

(Thereupon an adjournment was taken until Friday, April 5, 1946, at 10:00 o'clock a. m.)

---

Friday, April 5, 1946, 10:00 o'clock a. m.

The Court: Do you waive the roll call, stipulating and agreeing all the jurors are present and seated in the box?

Mr. Sullivan: Yes, your Honor.

Mr. Pratt: Yes, your Honor.

## ORAL ARGUMENT ON BEHALF OF DEFENDANTS BY MR. SULLIVAN

Mr. Sullivan: May it please your Honor, and ladies and gentlemen of the Jury, if some future historian of these Federal courts should at some time select a case where the Government has presented an accusation against business men which is presented upon suspicion, is supported by extravagant statements of witnesses for the Government and is founded upon the reluctance of certain wit-

nesses to come into court and testify candidly, such a historian could find no better example and could find no proceeding richer in illustration than this case to which you ladies and gentlemen have been listening for twelve long weeks.

Here is a case, ladies and gentlemen, where two witnesses who were disgruntled employees testified to transactions which of themselves are innocent, to twenty-eight transactions during the period of time when these men were doing business on Townsend Street and not one Government officer, with all their [47] files available to them, not one Government official has come into this courtroom and has put his finger on one transaction and given you one explanation and explained to you that that was an improper transaction that our clients are supposed to have done. Here is a case where a witness will ramble on in a particular transaction with the ready tongue of suspicion and at the behest of Counsel will remember, remember anything during the long period of from 1938 to 1942 and two witnesses, special agents in the Department of Justice, will get the circumstances and bring with them seven envelopes and yet leave in the closet their memories of anything that happened outside of what was in those seven envelopes.

Here is a case where two transactions were testified to by disgruntled employees as having occurred in the presence of two Army men and those Army men have come into court here and have not even given you an inkling, haven't given you an iota, of a transaction that may have occurred during the

very time they were supposed to have been present when it occurred. If you ladies and gentlemen were to scrutinize the face of this case as you would scrutinize the face of a man I firmly believe that you would say this is a case without character, it is a case that is full of suspicion, it is a case lacking in candor, in strength, and it is not a case which in any way should militate against good citizens and good businessmen. At the same time, this case is a very admirable example, and [48] it is a very strong lesson of the principles of law which are the safeguards and the protection of American citizens and American businessmen because the law says, ladies and gentlemen, that these men who have been accused in this courtroom are presumed to be innocent, and that presumption remains with them all throughout this trial and it goes with you into that jury room and remains with you all throughout your deliberations of this case. That is the great presumption of law that protects the American citizen against an unfounded accusation.

Now, first of all, may I explain that in a criminal proceeding along with that great presumption is a great burden which the law in its wisdom places on those gentlemen there, the burden of proof, to which I may devote more time than the time allotted to me and to Mr. Faulkner to explain to you the great significance and the great value of the burden of proof, but I am confident that no juror in this box would ever take a direct stand against it as I know it will be given to you by his Honor, namely, that every material fact, every essential element of

the crimes which are charged here they must prove, these gentlemen here must prove beyond a reasonable doubt and to a moral certainty. The burden is upon them, not upon us; although our evidence will show, and, as I think it has shown, it will show an explanation of the transactions which innocent in themselves, have been seized upon by the Government here as incriminating against these men, and in determining whether the [49] Government has proved to you beyond a reasonable doubt the essential nature of these crimes, the essential elements, you have to consider the credibility of witnesses. That is not a subject, ladies and gentlemen, to be glossed over, as I think it was by Mr. Houck. That is a subject which, I will show you, calls for a minute examination of everything that these witnesses testified to. What was their conduct on that witness stand? Were they cool and dispassionate or were they like Eddy Menges, who told in his own simple way how he did a big job? Or were they like Colonel Hand, ready to leap out of that witness chair because some still lurking vindictive spirit at last was brought to the surface? Or was it like Pineda, whose memory knew no limit and whose tongue knew no limit, who would ramble on and on and on and would select any date, any date you wanted. Are they credible witnesses compared to witnesses, for instance,—I will take somebody from another side of the case. I will take a man like Jackson who came up and talked about a business transaction just like a man goes into any ordinary business transaction. Jackson, you remember

him, tall, dark good-looking young man. The man answered all questions. He would say "I don't know" or "I think it was this way": an honest answer, not an answer like Pineda's. The only reason why he didn't have a transaction in the year 1937 was because this indictment does not go back that far. Mr. Hipelli would say "Take another date." He said, "All right. I'll take 1939." You remember the occasion when [30] he fixed a date in 1942 and after lunch he comes back, because he apparently was told that Nix could not be there at that time 1942 and he puts it back to 1941. That is the basis, that is the analysis for credible witnesses. How do they act? What is underneath this thing? It is not always a case of interest in a business. Mr. Houck lays great stress on the defendants being interested in the business. Of course they are interested in the business. They owned the business. Mr. Moncharsh is a stockholder in that business. There is nothing revealing about that, but what is the explanation for testimony like Mr. Pineda's? What is the explanation for testimony like Mr. Andrade's? Those are the facts to be evaluated by you ladies and gentlemen. Now, while I am speaking to you about this great protection that the law gives, I am speaking not only for Mr. Abraham Moncharsh. I speak at the same time for Mr. Berman; at the same time for Mr. Menges and for Mr. Goddard, and for a citizen that you do not see in this courtroom, but who is likewise present. We lawyers call it a fictitious person, a corporation, in this case the defendant Nye & Nissen. Each one of these gentlemen are entitled to be defended and their case is entitled to

be argued to you ladies and gentlemen and we are arguing it for each one of the defendants severally, but in the convenience of time, of course, as you must appreciate, we naturally must group the names all together and consider the argument as one; but each one of [51] these gentlemen is entitled to that presumption of innocence and the prosecution must prove its case against all these five defendants, what they have charged in this indictment beyond a reasonable doubt and to a moral certainty.

You will remember that the indictment charges a conspiracy, an unlawful agreement among these five people, the corporation and the four gentlemen who are in court here, to do an unlawful act, to defraud the United States Government during the period from January 1, 1938, until the finding of the indictment, some time in 1945. For practical purposes the proof stops at the end of the year 1944. In addition to that all of these gentlemen were charged with presenting false and fictitious invoices and claims to the United States Government. The six extra counts in the indictment which we call substantive counts cover the alleged false and fictitious invoices. It must be shown, ladies and gentlemen, with respect to the conspiracy and it must be shown beyond a reasonable doubt and to a moral certainty and they must satisfy your minds that with respect to that conspiracy there was an unlawful agreement to deceive and to defraud the United States Government as it is set forth in this indictment, and there must be an intentional par-

ticipation in that agreement, with knowledge of the agreement by each one of those men before any of those respective men can be found guilty of the crime of a conspiracy; and those essential elements these gentlemen must prove beyond a reasonable doubt. [52]

With respect to the other counts, the six substantive counts, they must prove beyond a reasonable doubt and to a moral certainty that those invoices that they complain of were in fact false and fictitious, that these defendants, each one of these defendants; Moncharsh, Berman as far as he is concerned, Menges as far as he is concerned, Goddard and the corporation know that they were false and fictitious, that they were invoices within the jurisdiction of an agency of the United States Government and these defendants, each of them, each man speaks for himself here. I am speaking for each man to protect his rights, and these gentlemen must show beyond a reasonable doubt that each man, each of them must have caused an invoice to be made in some way and was guilty of the intent to defraud the United States Government.

It is not as simple as Mr. Houck would gloss over it. It is all right for him to stand up here and say, "Ladies and gentlemen, look at the witness Pineda." I say this very sincerely, if Mr. Houck's brother or father, or if Mr. Pratt's brother or father were charged in this courtroom, ladies and gentlemen, I don't think they would ever honestly and sincerely entertain the conviction and thought that a witness testifying like Pineda, or a witness testifying like

Andrade, or a witness testifying like Nystrom was doing anything but attempting to ruin their reputation in business. I don't believe he had an honest conviction that Andrade and Pineda are credible witnesses, [53] but that was the best they could do in this case. Do you know why? Now, let us look at two things. Do you remember Mr. Pratt's opening statement? Now, Mr. Pratt is an able lawyer. Lawyers don't usually in opening statements like to tell you—he read practically the indictment, which is long, and had just finished explaining to the Jury—Mr. Pratt knows better than to be unduly repetitious, he gave but just one inkling of those charges that he would make against these men. He talked about the Cape Cumberland and even then he got it wrong. Mr. Berman did not have anything to do with the Cape Cumberland.

What is behind that? Why didn't he come out, as Mr. Faulkner did in his opening statement and say: "Ladies and gentlemen, the function of an opening statement is to tell you what we are going to prove so you can follow us; here is what we will prove?". I will tell you why. Because this case is based upon suspicion and in the proof of some of the instances which these men have seized upon there is not even a ground for that suspicion, and they would come here before you and have the temerity to tell you, ladies and gentlemen, that your minds have been satisfied, that you have no reasonable doubt and that you should take these men and you should ruin their reputations and you should take them away from their families. Why? Because

of a Pineda and an Andrade, the men who leave their memories in closets and talk in generalities, and Army inspectors who sit in this courtroom and begin themselves, made [54] fools of, or witnesses who won't even get up on that stand and testify that while they were in the plant of Nye & Nissen—I am talking about Colonel Hand, I don't see him—while he was in the plant of Nye & Nissen Mr. Menges or Mr. Goddard or Mr. Moncharsh put something over on him in the way Pineda said. He won't get up on that stand to deny those things.

What is the significance of the testimony here? Why do we have such a generic introduction by Mr. Pratt? Why do we have such a casual conclusion by Mr. Houck? Mr. Pratt's opening statement—I don't mean this in a personal, discourteous respect, I don't speak with any personal animosity toward Mr. Magee or Colonel Hand or anybody else, but I will with all sincerity speak my feelings about anything which affects the rights of my clients. Let's look at the significance, the scope of the testimony. In terms of time this testimony is divided into two classifications. I want to see if I can give you a graphic picture of the testimony concerning the operations in the plant on Townsend Street.

From January 1, 1938, until they moved in October, 1942, that is one distinct point of time, one unit, and they have two fact witnesses out of sixty-three witnesses. Ladies and gentlemen, they have what we would call two fact witnesses; two fact witnesses, two accusers for that whole period, with the exception that I will make a qualification for

Mrs. Bryant. There are two defendants on the case in chief, in that whole [55] periods who testified to about twenty-six incidents. Let me stress that, if I may, with just a little bit of repetition. At this one point of time when this conspiracy is supposed to have been in its induction and its early stages from 1938 to 1942, you have two witnesses testifying against our clients and they testified to those twenty-six transactions. Then we move, then the Government skips to 18 ships, 16 of which, to make it as simple as I can, are in a period from April 24, 1944, to May 12, 1944. In addition to that they have the case of the William Clark, which is pretty close, October of 1943. They have a man to pick a date in August, 1943, and I will talk about that later on.

That is how the testimony splits up. What is the significance of that? What does it mean? What should it mean to you, ladies and gentlemen? On one side twenty-eight instances and two witnesses, Mr. Pineda and Mr. Andrade. Neither Pineda nor Andrade are involved in the subsequent instances in 1944; they had quit. Then we have the 16 ships in the four or five week period from April 24 to May 12, less than that, along with two extra ships.

What is the significance of that? These gentlemen were supposed to prove their charge that there was a conspiracy in this case from January 1, 1938, to the date of the filing of the indictment to defraud the United States Government in the manner that they indicate, and they seize upon Mr. Pineda and [56] Mr. Andrade to prove the improper acts, what

are known as the overt acts, the acts upon which the unlawful purposes of the conspiracy are subserved. They seize upon them and they got twenty-six instances, and Colonel Hand threw in a couple more when he had three cases and fifty eggs out in the Presidio in 1941, and for most of the twenty-eight instances that are produced, not one witness from the United States Government to speak for one of those sales, not one official from the Army, not one official from the governmental agency, whether it was the Navy or War Shipping Administration or the C.C.C. Camp. They produced not one person to corroborate Pineda, to put his finger upon a transaction in which Mr. Pineda or Mr. Andrade said that something illegal was done. To corroborate Pineda and put his finger upon a transaction in which Mr. Pineda or Mr. Andrade said that something illegal was done. These men have at their disposal, as you know and as I know, they have at their disposal all the files that are always directly kept by the United States Government; the United States Government has archives that are endless, and they do not bring one purchase order or invoice or record on any of the instances that Mr. Pineda selected. I don't see how anybody could follow Pineda. Mr. Hipes had Mr. Pineda on the stand and Pineda jumped from 1937 to 1939, to 1942, back to 1941. He is the most agile witness. I firmly believe he is the most agile witness that ever slipped in and out of a witness chair. He would say [57] anything. He would make such extravagant statements, any sort of a statement, and there

was something in Pineda's mind that made him do those things. Don't believe that he sat there in fear that he would be indicted. Mr. Houck or Mr. Pratt couldn't tell me that. Mr. Pineda knew very well he wouldn't ever be touched, yet he is an accomplice. He is an accomplice by his own statement. He is a person who is supposed to have aided in these crimes, and if that is so his testimony under the law and under the rules, as I am sure his Honor will give it to you, must be evaluated with great caution. That is why I say that such a cautious gentleman as Mr. Houck would not want to see one of his relatives convicted upon the testimony of a Pineda or an Andrade.

Now, they laid great stress on three overt acts that occurred during that time on Townsend Street, the butter incident in February, 1942, then an incident with Mr. Andrade where he had a 500-case order for the Navy in June, 1940, and, lastly, that occasion of switching eggs in February of 1942. They mentioned some of the others, but do you notice how the Government did not develop the other testimony on the twenty-eight acts that they put on this witness stand, the twenty-eight acts that they put into this case, they would now like to forget that. They would like to have you say, "This is very easy, ladies and gentlemen, that we have a pattern here. All these men are relatives, they all work together." They [58] say, "We have three overt acts to look at," that "we proved the overt acts." They don't want to go into these other twenty-six acts. They don't like that. Mr. Pineda

rambled a little bit too much for them. Now they would like to say in a very casual way, "Look at the three overt acts." Well let us look at the three overt acts and then let us look at some of the other acts that they have not looked at.

February 1, 1942, it is alleged in this indictment Mr. Nix, Mr. Menges and Mr. Goddard short weighed butter and Mr. Pineda said so on that stand. Ladies and gentlemen, I very respectfully submit to you, and I am very sincere in this, that when Pineda said that he lied. Every bit of the testimony concerning that transaction that was actually mentioned by Pineda did not ring true. That is what I mean when I say you must take this case and you must say to yourselves, "Does this testimony ring true?". They would just love to have had somebody to put on the stand to back up Pineda, but they didn't have anybody, because there were no illegal transactions. They could have had people in here. They did not have to take Pineda. Colonel Hand was in that place. Why didn't they put him on for that purpose? Colonel Keelsmeier was not used. What do they do with him? They brought him in through that door and they sat him down right there and without asking a question of Pineda he said, "That is the man I meant; I was not talking about Colonel Foster, that is the man I meant." [59]

If you had read this record as Mr. Faulkner and I have, if you would look at that incident as it is recorded you would see in substance this: a man enters that door. He does not even state his name.

The Government does not dare put him on that stand and ask him his name. We don't know where he came from or how he arrived in this court room at that time; he is the man that is mentioned time and again by this Mr. Pineda as the man that Menges fooled and Goodard fooled and Berman fooled. Why didn't they put him on that stand? You know why. Because he would have given the lie to Pineda. Those illegal transactions never took place. The best way to prove them would be to prove them by Colonel Keelsmeier. They were afraid to even let him get onto that stand so Mr. Faulkner could cross examine him. How about Colonel Hand? He doesn't tell you about improper acts there. He tells you that he woke up one morning early at the Presidio and went out and inspected some eggs. They didn't try to tie that up; but the witness Pineda said they fooled Hand time and again. Why didn't this Government that has prepared this case apparently down to crossing the last "t" and dotting the last "i", why didn't they ask Colonel Hand on the stand to describe what he saw in that plant on Townsend Street? You know why. Because it never took place and because if they put Hand on the stand, if they put Keelsmeier on that stand they would have to keep Pineda off that stand and they would have no case. [60]

Mr. Houck said he was going to produce Steffenhagen, the Army man, one of the three Army men. They have not produced him. Then they have Colonel Foster. What does he say? He attempts to contradict Mr. Moncharsh, but he does not at-

tempt to say that anything was wrong in the plant, and he was available to them. He was not here when we were trying this case and they were producing this record. That is all very significant, ladies and gentlemen, and if you were on trial in this case, do you think it would be a candid way to charge you; do you think the case would ring true against you; do you think it would be a case devoid of suspicion; do you think it would be a case without doubt if a case is presented in that fashion and the men whom you were supposed to have defrauded are brought into this courtroom and they won't even describe the circumstances?

There is a principle of law that if they don't produce a witness available to them to testify then you have a right to infer that the testimony would be adverse to them. That is just the point. It was adverse and I think there was no case without Pineda and they could not use Pineda if they used Hand; they could not use Pineda if they used Keelsmeier; they could not use Pineda if they used Foster, and they could not use Pineda's proof if they brought in the archives of the Federal Government just one document, one document which would be material evidence during this period from January 1, 1938, to [61] October, 1942, for one transaction; they could not use them because that transaction, if it ever occurred, was perfectly proper, it had to be proper. Colonel Foster was right there on the stand yesterday. That might be some indication why they didn't want him up there. He said these cases were inspected at the point of destina-

tion, that the butter was weighed at the point of destination. Then what was the point of switching eggs? Why are you going to switch eggs if when they are sent out to the United States Government they are going to inspect them all over again? There is no sense to that. Why would you short weigh butter if a man is going to weigh it at the point of destination? That is why these witnesses did not appear here, because if those officers gave you the testimony in their own words it would coincide with the testimony just exactly the way things occurred, just the way they came into that plant and drew out samples and the samples were drawn just the way they told them to draw their samples.

In February, 1942, they are supposed to have short weighed butter. There were ten thousand pounds of butter being cut there. If that was short-weighted, where is the complaint that the United States Army men have made, because they must have inspected that butter at the point of delivery. Where is the credit memorandum that we should have made on that, so we could give an explanation? We don't see any of those things here. Do you know why that incident did not take place? In [62] the first place, the whole testimony of Pineda as to how that transaction happened is so unreliable and ridiculous that it reflected on the very incident itself. He described how he weighed the butter on the scale and how the inspector would walk around there and how he put a little pull of butter underneath the scale to fool himself, or who-

ever was looking at the scale. That never occurred. These gentlemen would not have permitted it to occur because it could not have occurred under the Army inspection service. There were men in that room all the time and it never occurred. It is only a figment of his imagination because he very nicely puts it at February 20, 1942. You heard Mr. Houck point it out as of that date because Mr. Pineda gave out some cigars on February 16 and Mr. Houck says that is not much of a material variance because they allege it was done on February 1.

Then we come to Mr. Andrade. They bring a stamp in here and they talk about a counterfeit stamp. And they bring a stamp in here—you remember, the Specials was a grade of egg equal to a AA and then the Extras was the A and Standards are the B. They bring that stamp and it is here in evidence, in here, U. S. Specials, and Mr. Andrade says that at about this time there was this spurious stamp on the U. S. Specials, they were stamping those cases going to the Navy in June, 1940. We have shown you that we never sold Specials to the Navy. There again they have all the records of our sales. Why didn't they [63] bring those in? Because they could not prove that transaction and they could not prove it because it did not occur. You looked at Andrade as he sat up on the witness stand. Imagine him there right now. Did that testimony of his ring true? Andrade was truck driver. How does he place this date? Because the Democratic National Convention was meeting and Henry Wallace and Franklin Roose-

velt were running for office. I don't know whether it was your reaction, but it was my instant reaction, it was my immediate mental reaction. I couldn't remember when Henry Wallace ran for office when he said that. I didn't have any recollection. Well, Roosevelt has run quite a few times, but I couldn't say whether Wallace ran with Roosevelt in 1936 or 1940 and still this man has a very good recollection. Why did he say that? Because he could not place the incident by other means and he had to get within the terms of this indictment which says it was in June, 1940, so he tries to think of something and he picks the Democratic National Convention and the Government would have you believe that that came to Mr. Andrade's own mind unassisted by anyone and I say that that did not happen. It is not likely a truck driver would think of Henry Wallace in 1940 and running in the year 1940. How would you place a date in 1940? You would place it close to something that was close to you. He was not a delegate to that convention. You would place it as to some death in your family or some birth in your [64] family, or if you made a trip to Hawaii; that is how you would do it.

Then we have as a next overt act, we have the charge that there was some switching of eggs in February of 1942. This is alleged in the indictment. It is alleged that in February, 1942 Mr. Moncharsh, Mr. Goddard, Mr. Menges and Mr. Nix went down and switched some eggs bearing U. S. Department of Agriculture and the Army stamp. So they had two stamps. That is what it says in

the indictment, and that is the way they charged it. Mr. Houck yesterday referred to the testimony of Mr. Pineda about the switching of eggs at night. I wonder—did he forget that Pineda testified that they transferred eggs twice; they transferred them in August of 1941, and in November, 1941. Now, which is it? On one of the occasions Mr. Pineda testified that they went down to transfer eggs, that was in August, 1941, and they removed wire straps, and on the next occasion he said they transferred eggs that had some kind of Army stamp on, where Mr. Menges has described as the operation of transferring eggs. These people have done it all the time. There is no illegality in transferring eggs. That is their business, to take eggs out of a case and put them in another case, but it is an innocent transaction. That is the end to which they have gone in attempting to pin something on these men. They have tried to make it appear as an improper transaction. Menges told you in his own words that they never did any [65] such thing in one operation. Whose testimony did these candlers verify when they came in here? They told you, none of them told you that the cases were used for any particular purpose. They did not say where the cases came from. They never said that at any time the cases were not defaced. Menges said that he defaced many cases. You must bear in mind that these people, Nye & Nissen, when they were handling these large quantities of eggs, in order to ascertain their grade they would call for these casual inspections that would have nothing to do with a specific

Army order. They would only want to find out the grades of eggs as they would come in and they would call the Department of Agriculture inspectors and they would grade them. Those eggs were not designated for any particular order. They were the property of Nye & Nissen. It did not have anything to do with a particular order and it was a perfectly innocent transaction. As Ed Menges pointed out on the witness stand, if City Sales were short they took the eggs out of those cases and put them in other cases in order to save those cases, or put them in half-cases. There was nothing wrong in that.

On another occasion they said they went down to Pier 16. Pineda testified that Mr. Moncharsh was there and there were some specially marked cases and Pineda participated in that transaction where the cases were taken off the truck and they were so placed so that certain so-called sample cases were put on the top and in a position whereby some—I don't know, I [66] cannot understand it, by some magic the Department of Agriculture inspector who drew his own samples, or the Army inspector who came to take a look at those cases would take the samples from exactly where Smiley, the truck driver, had had them place the sample cases. Smiley is the one who placed them on the truck in Petaluma, he is the one who drove the truck here to San Francisco, yet they don't produce him. We are not being confronted by our accusers, ladies and gentlemen. That is not a candid case. That is a case that is based upon suspicion. If you were

here sitting in the place of these defendants you would not want to be confronted with that kind of a case, would you?

Now, these gentlemen who are American citizens, who are men of good standing are here before you. I am not going to make any great appeal for them now, because Mr. Faulkner will finish up with his argument which, I am sure, will be completely adequate for all defendants, but they do come here and they through me say to you very sincerely, ladies and gentlemen, that they did not do any illegal or improper act, and I say that with all sincerity there is no evidence in this record beyond suspicion, beyond doubt, there is no evidence in this record which makes them criminals. With that appeal and with sincere hopes I leave their case with you.

The Court: The jurors may be excused for a recess.

(After recess.) [67]

## ORAL ARGUMENT BY MR. FAULKNER ON BEHALF OF DEFENDANTS

Mr. Faulkner: Your Honor, please, and ladies and gentlemen of the Jury, it has always been my hope to some time be in a case where I have no work to do other than to sit and observe the proceeding that have gone one, especially in a case of this duration. I, of course, wish to join in thanking you for the patience you have shown and at times the courtesy and other times the discourtesy of the prosecution, and in that connection I have

been more discourteous to them by far than any man at that table has been to me, and in those instances where I have been, particularly to Mr. Pratt, I think after we have been in cases, as I have over the years, after a certain number of weeks everyone begins to get on edge. Then some of us get ill. I remember Mr. Barton. We realize that we have not lived our normal way of life during these weeks, that we have been performing a duty, you have been performing a duty and the lawyers have been performing a duty. We have all been performing our duty.

The Judge, of course, is the exclusive judge of the law in this case. An outline of the law was made to you by Mr. Sullivan, the principle of which is that the case must be proved at least beyond a reasonable doubt. There is another principle of law to which you will have your attention directed. It is more important than any principle of which you know, and the Judge will give it to you. He will tell you, not in these words, but to this effect, that where a set of facts and circumstances are submitted to you and under one theory you see where there is guilt and under another theory you see that there is innocence and it is your bounden duty as jurors to follow the road of innocence. If you can reach two conclusions from one set of facts it is your bounden duty as citizens to reach the conclusion of innocence. That is as old as any principle of law there is.

Now, ladies and gentlemen, I am not going into a harangue about some of these people who have